

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DUANE HALL,

Plaintiff,

v.

FLUOR HANFORD, INC.,

Defendant.

No. CV-08-5029-EFS

**ORDER GRANTING PLAINTIFF'S
MOTION TO AMEND COMPLAINT AND
DENYING AND DENYING AS MOOT
DEFENDANT'S RULE 12(b)(6)
MOTION TO DISMISS**

Before the Court, without oral argument¹, are Defendant's Rule 12(b)(6) Motion to Dismiss (Ct. Rec. 9) and Plaintiff's Motion to Amend Complaint (Ct. Rec. 21). Defendant argues that Plaintiff fails to state an Americans with Disabilities Act (ADA) discrimination claim and, therefore, dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(6), followed by dismissal of the state law claims pursuant to 28 U.S.C. § 2367(c)(3). Plaintiff contends that the

¹ Defendant set its motion to be heard without oral argument. (Ct. Recs. 11 & 12.) The Court later set it to be heard with oral argument. (Ct. Rec. 17.) After reviewing Plaintiff's Motion to Amend Complaint, however, the Court finds oral argument on both motions is unwarranted. LR 7.1(h)(3).

1 Complaint is sufficient as plead but seeks leave to amend if the Court
2 finds a pleading flaw. After reviewing the submitted materials and
3 applicable authority and hearing from counsel, the Court is fully
4 informed. For the reasons given below, the Court grants Plaintiff's
5 motion and denies Defendant's motion.

6 **A. Facts²**

7 Plaintiff began working for Defendant in 1999 as a nuclear chemical
8 operator (NCO) trainee and then later as a NCO journeyman. (Ct. Rec. 7
9 ¶ 4.5.) Plaintiff received treatment for psoriasis periodically between
10 2003 and 2006. *Id.* ¶¶ 4.6, 4.7, & 4.11. In June 2006, Defendant
11 referred Plaintiff to AdvanceMed Hanford ("AdvanceMed") for a medical
12 evaluation. *Id.* ¶ 4.13. AdvanceMed cleared Plaintiff to return to work
13 with two restrictions: (1) Plaintiff could not work where skin
14 contamination was likely to occur to his gluteal area and (2) he could
15 not work in temperatures above 72 degrees if he was required to wear
16 multiple layers of protective clothing. *Id.* Two weeks later, Defendant
17 again requested AdvanceMed perform a work suitability evaluation.
18 AdvanceMed's conclusions were essentially the same as before - Plaintiff
19 could return to work subject to the above two conditions. *Id.* ¶ 4.14.

20 Defendant informed Plaintiff on August 1, 2006, that these
21 restrictions could not be accommodated, that no other jobs at the 500-
22 plus-employee company were available, and to go home. *Id.* ¶¶ 4.3 &
23 4.15. For the next year-and-a-half, Defendant did not allow Plaintiff

24 ² The "Facts" section was developed construing the alleged
25 facts in Plaintiff's favor. *See Broam v. Bogan*, 320 F.3d 1023,
26 1028 (9th Cir. 2003).

1 to return to work because AdvanceMed's findings resulting from the three
2 follow-up medical evaluations continued to be the same. *Id.* ¶¶ 4.16-
3 4.30.

4 After Plaintiff received a right-to-sue notice from the EEOC in
5 February 2008, Defendant offered Plaintiff full-time employment, which
6 Plaintiff accepted. *Id.* ¶¶ 4.29 & 4.30. This lawsuit followed.

7 **B. Dismissal Standard³**

8 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency
9 of the pleadings. *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001).
10 A complaint may be dismissed for failure to state a claim under Rule
11 12(b)(6) where the factual allegations do not raise the right to relief
12 above the speculative level. *Bell Atl. v. Twombly*, 127 S. Ct. 1955,
13 1965 (2007). Conversely, a complaint may not be dismissed for failure
14 to state a claim where the allegations plausibly show that the pleader
15 is entitled to relief. *Id.* In ruling on a motion pursuant to Rule
16 12(b)(6), the court may generally consider only the allegations
17 contained in the pleadings, exhibits attached to the complaint, and
18 matters properly subject to judicial notice; the court must construe
19 these matters in the light most favorable to the plaintiff and must
20 accept all material allegations in the complaint, as well as any
21

22 ³ The parties dispute whether *Bell Atlantic v. Twombly*, 127
23 S. Ct. 1955 (2007), applies to this action. This Court concludes
24 that *Twombly*'s requirement that a complaint must plead enough facts
25 "to raise the right to relief above the speculative level" applies
26 to this Rule 12(b)(6) motion. See *id.* at 1965.

1 reasonable inferences drawn therefrom. *Broam v. Bogan*, 320 F.3d 1023,
2 1028 (9th Cir. 2003); see also *Outdoor Media Group, Inc. v. City of*
3 *Beaumont*, 506 F.3d 895, 899-900 (9th Cir. 2007); *Chang v. Chen*, 80 F.3d
4 1293 (9th Cir. 1996). Motions to dismiss are viewed with disfavor and
5 are rarely granted. *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th
6 Cir. 1986).

7 **B. ADA Claim**

8 Defendant seeks dismissal of Plaintiff's ADA claim because (1)
9 Plaintiff pled himself out of an ADA claim by alleging that he "is not
10 a 'qualified individual with a disability' within the meaning of 42
11 U.S.C. § 12111(8)" and by failing to address this argument and (2)
12 Plaintiff failed to plead facts to support a finding that Defendant
13 regarded Plaintiff as suffering from a physical impairment that
14 substantially limited his ability to work.

15 1. Qualified Individual with a Disability

16 A successful ADA claimant must show that he is a "qualified
17 individual with a disability," along with showing that his employer was
18 a covered entity and that the employer discriminated against him because
19 of this disability. 42 U.S.C. § 12112; see also *Cleveland v. Policy*
20 *Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999) ("An ADA plaintiff bears the
21 burden of proving that she is a 'qualified individual with a
22 disability.'"); *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 193 (2002).
23 Section 12111(8) defines a "qualified individual with a disability" as:
24 an individual with a disability who, with or without
25 reasonable accommodation, can perform the essential functions
26 of the employment position that such individual holds or
desires. . . .

42 U.S.C. § 12111(8). In turn, a disability is:

- (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (b) a record of such an impairment; or
- (c) being regarded as having such an impairment.

42 U.S.C. § 12102(2); *Deppe v. United Airlines*, 217 F.3d 1262, 1265 (9th Cir. 2000); 29 C.F.R. § 1630.2(g).

In Second Amended Complaint paragraphs 4.10 and 5.1, Plaintiff alleges that Defendant regarded his psoriasis as a physical impairment that substantially limited his ability to work. (Ct. Rec. 7.) Paragraph 4.8 of the Second Amended Complaint (consistent with the original Complaint and the Amended Complaint) states, however, "As a result of this psoriasis condition, Mr. Hall *is not* a 'qualified individual with a disability' within the meaning of 42 U.S.C. § 12111(8)." *Id.* (emphasis in original). In his motion to amend, Plaintiff asserts that the phrase "[a]s a result of this psoriasis condition" indicates that he is conceding that his psoriasis is not a physical impairment that substantially limits his a major life activity. The Court finds paragraph 4.8 ambiguous and confusing. In isolation, Defendant reasonably read paragraph 4.8 as conceding the required ADA "qualified individual with a disability" element. However, such an interpretation of paragraph 4.8 runs contrary to the remainder of the complaint, in particular paragraphs 4.9, 4.10, and 5.1, which clearly set forth an ADA "regarded as" claim.

Plaintiff seeks leave to amend paragraph 4.8; Defendant maintains that Plaintiff waived the ability to correct paragraph 4.8 because Plaintiff failed to address paragraph 4.8's deficiencies in his response to Defendant's motion. Under certain circumstances, a failure to oppose an argument permits an inference of acquiescence and "acquiescence

operates as a waiver." *Cincinnati Ins. Co v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001).⁴ Here, however, the Court finds good cause to allow Plaintiff to amend his complaint under Federal Rule of Civil Procedure 15.⁵ Absent paragraph 4.8, the complaint clearly put Defendant on notice that Plaintiff was pursuing an ADA "regarded as" claim. Accordingly, the Court finds Plaintiff's failure to address Defendant's argument regarding paragraph 4.8 in his opposition does not preclude Plaintiff from seeking leave of Court to amend - the Court grants such leave. Plaintiff shall file a Third Amended Complaint no later than October 2, 2008.

2. "Regarded As"

There are two ways in which an employee may be regarded as disabled:

(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual-it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

⁴ Defendant also relies upon *Image Technical Services v. Eastman Kodak Co.*, 903 F.2d 612, 615 n.1 (9th Cir. 1990). *Image Technical Services* is distinguishable, however, as it addressed a different issue - what issues the Ninth Circuit will address on appeal.

⁵ Leave to amend a complaint should be "freely" given "when justice so requires." FED. R. CIV. P. 15(a)(2).

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2 *Sutton v. United Air Lines*, 527 US. 471, 489 (1999). The Court
3 understands this lawsuit to involve the latter "regarded as" claim.
4 Therefore, to survive Defendant's motion to dismiss the "regarded as"
5 claim, Plaintiff must allege sufficient facts to support a finding that
6 (1) Plaintiff had a physical impairment and (2) Defendant subjectively
7 believed that this impairment substantially limited Plaintiff's ability
8 to work. See *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1006 (9th
9 Cir. 2007).

10 Based on the proposed Third Amended Complaint, the Court
11 understands Plaintiff's position to be that his psoriasis was a physical
12 impairment, but that this impairment is not a substantially limiting
13 impairment as defined by 42 U.S.C. § 12102(2). Accordingly, the Court
14 denies Defendant's motion.

15 The next issue is whether the complaint alleges sufficient facts to
16 support a finding that Defendant regarded Plaintiff's actual, non-
17 limiting psoriasis impairment as substantially limiting the major life
18 activity of working. EEOC regulations specify that a person is
19 "substantially limited" in the major life activity of working if he is:

20 significantly restricted in the ability to perform either a
21 *class of jobs* or a *broad range of jobs* in various classes as
22 compared to the average person having comparable training,
skills and abilities. The inability to perform a single,
particular job does not constitute a substantial limitation in
the major life activity of working.

23 29 C.F.R. § 1630.2(j)(3)(i) (emphasis added); *Coons v. Sec'y of U.S.*
24 *Dep't of Treasury*, 383 F.3d 879, 885 n.1 (9th Cir. 2004); see *Walton*,
25 492 F.3d at 1009. A "class of jobs" includes "the number and types of
26 jobs utilizing similar training, knowledge, skills or abilities, within

1 [the employee's] geographical area," 29 C.F.R. § 1630.2(j)(3)(ii)(B);
2 whereas, a "broad range of jobs" includes "the number and types of other
3 jobs not utilizing similar training, knowledge, skills or abilities
4 within that geographical area," *id.* § 1630.2(j)(3)(ii)(C). Whether an
5 employee is regarded as disabled in the major life activity of working
6 involves a subjective determination; while, what constitutes a class or
7 a broad range of jobs is an objective determination. *Jones v. United*
8 *Parcel Serv.*, 502 F.3d 1176 (10th Cir. 2007).

9 Defendant maintains Plaintiff pled himself out of an ADA "regarded
10 as" claim by pleading that "Defendant refused to allow [Plaintiff] to
11 work as a Nuclear Chemical Operator [NCO] on account of his psoriasis."
12 (Ct. Rec. 7 ¶ 5.1.) Defendant maintains this alleged fact, even if
13 true, evidences that Defendant only regarded Plaintiff as unable to
14 perform a single, particular job - and not substantially limited in the
15 major life activity of working. The Court does not read the Complaint
16 so narrowly.

17 In addition to pleading that Defendant would not allow him work as
18 a NCO journeyman, Plaintiff alleges Defendant, an employer of over 500
19 people, did not consider Plaintiff qualified because of his psoriasis
20 for any other available jobs for approximately one-and-a-half years.
21 Although Plaintiff resided in a community of approximately 150,000,
22 Plaintiff was employed in a specialized field. The Court finds
23 Plaintiff pled sufficient facts to satisfy the notice-pleading
24 requirements for an ADA "regarded as" substantially limited in the major
25 life activity of working claim. Whether Plaintiff can present
26 sufficient evidence, notwithstanding AdvanceMed's evaluations, that

1 Defendant subjectively believed his psoriasis substantially limited his
2 ability to work in either a class of jobs or a broad range of jobs is a
3 matter for summary judgment.

4 **C. State Law Claims**

5 Because the Court denies Defendant's request to dismiss the ADA
6 claim, the Court denies as moot Defendant's request to dismiss the state
7 law claims due to lack of supplemental jurisdiction under 28 U.S.C. §
8 1367(c)(3).

9 **D. Conclusion**

10 For the above-given reasons, **IT IS HEREBY ORDERED:**

11 1. Plaintiff's Motion to Amend Complaint (**Ct. Rec. 21**) is
12 **GRANTED**. Plaintiff shall file a Third Amended Complaint in order to
13 amend paragraph 4.8 consistent with this Order no later than October 1,
14 2008.

15 2. Defendant's Rule 12(b)(6) Motion to Dismiss (**Ct. Rec. 9**) is
16 **DENIED (ADA) and DENIED AS MOOT (state law claims)**.

17 3. The September 30, 2008 hearing is **STRICKEN**.

18 **IT IS SO ORDERED**. The District Court Executive is hereby directed
19 to enter this Order and furnish copies to counsel.

20 **DATED** this 29th day of September, 2008.

21
22
23 s/ Edward F. Shea

24 EDWARD F. SHEA
25 UNITED STATES DISTRICT JUDGE

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